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No. 93-901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM D. WEST,

Cross-Petitioner,

vs.

NORTHWEST AIRLINES, INC.,

Cross-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN RESPONSE TO CROSS-PETITION

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QUESTIONS PRESENTED

Where an air carrier has given a passenger written notice of possible overbooking, the text of which is mandated by the regulatory agency, is a state law claim for punitive damages alleging that the notice was not adequate preempted by Section 105 of the Federal Aviation Act, 49 U.S.C. App. §1305?

Is the state law claim for punitive damages preempted because it conflicts with the overbooking program of the Department of Transportation?

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BRIEF IN RESPONSE TO CROSS-PETITION

THE CROSS-PETITION SHOULD BE DENIED

This is the second time that Cross-Petitioner William West has petitioned this Court for the right to sue for punitive damages because he was bumped from an oversold Northwest Airlines' flight.[1] West's first petition requesting the same relief was denied by this Court in Docket No. 91-505 on June 8, 1992. See copy of the memorandum order

[1] Pursuant to Rule 29.1 of this Court, Cross-Respondent states that Northwest Airlines, Inc. does not have corporate parents or subsidiaries, the shares of which are publicly traded.

in the Appendix to Northwest's petition No. 93-803 at C-1. On the same day, this Court had granted the cross-petition of Northwest Airlines, vacated the judgment of the Ninth Circuit, and remanded in light of *Morales v. Trans World Airlines, Inc.*, 504 U.S. ____, 112 S.Ct. 2031 (1992) (*id.* at B-1). Thereafter, West's motion for rehearing correctly argued that, pursuant to Supreme Court Rule 13.5, this Court could not grant Northwest's cross-petition in No. 91-734 without granting West's petition in No. 91-505. This Court then vacated its June 8, 1992 order denying West's petition and granted *certiorari*, remanding that aspect of the case to the Ninth Circuit as well (*id.* at D-1).

The procedural reason which persuaded this Court to vacate its original denial of West's petition no longer exists. Because Northwest should not be liable for punitive damages for participating in a denied boarding program which was developed by the Civil Aeronautics Board and is currently regulated by the Department of Transportation, and because there is no conflict with any decision found in any similar situation, West's cross-petition should be denied.[2]

Cross-Petitioner West first argues that "it would be illogical" to sever his cross-petition seeking to recover punitive

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[2] While Northwest believes that the Cross-Petition should be denied, both West and Northwest agree that Northwest's petition in No. 93-803 should be granted. In West's response in No. 93-803, he concedes that the decision by the Ninth Circuit below conflicts with decisions in the Fifth and Seventh Circuits (West Brief in No. 93-803 at 8). "[W]e submit that the lack of guidance provided by *Morales* and the varying approaches taken by lower courts in its wake argue in favor of granting review here" (*id.*). West further states that "A decision by this Court would thus provide important guidance on an issue which *Morales* did not address, *i.e.*, how precisely to identify which tort and contract claims are preempted by section [1305] and which ones are not" (*id.* at 1). Because of the "atypical set of facts" in *Morales* "additional guidance from this Court would be useful" (*id.* at 2). Northwest agrees that the issues presented are significant and that intervention by this Court is appropriate and necessary to resolve the present confusion.

damages in No. 93-901 from Northwest's petition in No. 93-803 concerning preemption of compensatory damages (Cross-Petition at 6). West does not consider, however, that the factual situation of this case is dramatically different from those in the cases he relies on. Here, the Department of Transportation has constructed a system of liquidated damages which, in its view, benefits both the travelling public and the airline industry. The system enables most passengers to breach, at will, their contract by deciding not to show up for their flights and then to use their tickets on the original or other airlines for transportation at another time without any cost to the passengers.[3] Recognizing that punitive damages are inappropriate in this federally regulated system, the court below found that: "Overbooking and bumping are accepted forms of price competition and [price] reduction in the deregulation period, thus any law or regulation which results in penalizing airlines for these practices is preempted by the FAA" (appendices to Northwest's petition in No. 93-803) ("Pet. App." at A-7).

Secondly, plaintiff seeks to merge tort claims with what is really a breach of contract claim to honor Mr. West's confirmed reservation. Not long ago, this Court discussed the importance of maintaining the distinctions between the law of contract and that of tort. In *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295 (1986) the Court distinguished between liability under a warranty contract and tortious claims for products liability

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[3] There are, of course, certain airline fares in which the passenger agrees to pay a certain amount should that passenger decide not to take the flight. In exchange, the price of that ticket is significantly reduced. Mr. West was such a passenger. Upon his being denied boarding, Northwest offered to put him on a later flight that day and to pay him denied boarding compensation, both of which he refused. West chose to make the trip about two weeks later using the same ticket.

and negligence. There this Court acknowledged the concern that if product liability law "were allowed to progress too far, contract law would drown in a sea of tort" (476 S.Ct.866, 106 S.Ct. at 2300). Punitive damages would be inappropriate in any case.

Cross-Petitioner West argues at page 9 that he is not seeking punitive damages "to punish overbooking *per se*, but [rather to punish] the practice of telling passengers they had a 'confirmed' reservation when, if fact, they did not." In this case, however, Northwest included in Mr. West's ticket the notice mandated by 14 C.F.R. §250.11(b), "NOTICE-OVERBOOKING OF FLIGHTS." That notice warned that "Airline flights may be overbooked, and there is a slight chance that a seat will not be available on a flight for which a person has a confirmed reservation." This section, which came into effect in 1982 and was amended in 1984, was not in effect when this court decided *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). Nor was, of course, section 1305 which came into effect in 1978. *Nader*, therefore, is inapposite.

The recent decision by the Supreme Court of Illinois, *Wolens v. American Airlines, Inc.*, 1993 WL 518593 (Ill. 16 Dec. 1993) has no connection to a federally mandated program. Rather, the court held that Illinois state law, the basis of a class action protesting changes that American had made to its frequent flyer program, was not preempted by section 1305. *Wolens* does illustrate, however, the need to give further guidance concerning the application of section 1305.

None of the other cases cited in support of the cross-petition, *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992); *English v. General Electric Co.*, 496 U.S. 72 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); or *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), interprets the Federal Aviation Act. Moreover, and significantly, none involves a breach of contract situation where

the regulating authority has so carefully crafted the balance of rights and obligations, and has so meticulously drafted the exact text of the notice which appears on the ticket. In such circumstances the court of appeals was certainly correct in finding, as a matter of law, that a claim for punitive damages was wholly unwarranted and preempted.

CONCLUSION

As it did previously, this Court should deny West's cross-petition and grant Northwest's petition.

Respectfully submitted,

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